Supreme Court, U.S.
FILED
NOV 22 1993
OFFICE OF THE CLERK

No. 93-457

In the Supreme Court of the United States

OCTOBER TERM, 1993

GERARD A. MILLER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

SIMON M. LORNE
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

RANDALL W. QUINN
Senior Litigation Counsel

DIANE V. WHITE
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Securities and Exchange Commission erred in denying petitioner's request to vacate an administrative sanction imposed upon him by consent on the basis of allegedly "new" evidence, where the request was made six years after petitioner discovered the evidence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Board of Educ. v. *Dowell*, 498 U.S. 237 (1991)	8
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	6
Kozlowski v. *Coughlin*, 871 F.2d 241 (2d Cir. 1989)	7
New York State Ass'n for Retarded Children, Inc. v. *Carey*, 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983)	7
Rufo v. *Inmates of the Suffolk County Jail*, 112 S. Ct. 748 (1992)	8
SEC v. *Warren*, 583 F.2d 115 (3d Cir. 1978)	5, 7
System Federation No. 91, Railway Employees' Dep't v. *Wright*, 364 U.S. 642 (1961)	7
United States v. *United Shoe Machinery Co.*, 391 U.S. U.S. 244 (1968)	7
United States v. *Swift & Co.*, 286 U.S. 106 (1932)	3, 6, 8

Statutes, regulation and rule:

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:	
§ 15(b)(4)(E), 15 U.S.C. 78o(b)(4)(E)	4
§ 15(b)(6), 15 U.S.C. 78o(b)(6)	4
§ 15(c)(3), 15 U.S.C. 78o(c)(3)	2
17 C.F.R. 240.15c3-3 (Rule 15c3-3)	2, 3
Fed. R. Civ. P. 60(b)(2)	6

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-457

GERARD A. MILLER, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 998 F.2d 62. The order of the Securities and Exchange Commission (Pet. App. 8a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1993. The petition for a writ of certiorari was filed on September 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In an administrative proceeding brought by the Securities and Exchange Commission, petitioner consented to the imposition of a censure based on findings that he had willfully aided and abetted violations of the Securities Exchange Act of 1934. More than six years after the censure was imposed, he petitioned the Commission to expunge or delete that censure on the basis of "new" evidence that had come to his attention shortly after the entry of the censure. The Commission denied petitioner's request. The court of appeals affirmed, holding that in light of the unreasonable delay and the substantial prejudice that the Commission would experience if it had to reopen the case, the Commission did not err in refusing to grant the requested relief.

1. Petitioner was the Director of Operations for Kidder Peabody & Co., Inc., a major brokerage firm. On February 6, 1986, the Commission entered a consent order censuring petitioner for aiding and abetting Kidder's violation of Section 15(c)(3) of the Exchange Act, 15 U.S.C. 78*o*(c)(3), and Rule 15c3-3 thereunder, 17 C.F.R. 240.15c3-3. The order also barred petitioner from acting in any supervisory capacity with respect to certain requirements of Rule 15c3-3 for a period not to exceed 12 months. Rule 15c3-3 requires, among other things, that customer-owned securities be delivered to the customer's account after purchase. Kidder had violated this rule on several occasions by using such securities on lists of proposed short-term collateral for its lenders and in conjunction with repurchase agreements. Pet. App. 2a-3a. Because the proceeding against petitioner

was resolved by consent without an evidentiary hearing, no evidentiary record was created. *Id.* at 3a.

In the same month that the consent order was entered, petitioner learned of a 1982 letter from the New York Stock Exchange to his supervisor, John T. Roche, informing Roche of concerns about Kidder's compliance with Rule 15c3-3.[1] More than six years later, petitioner asked the Commission to expunge or delete the censure. Petitioner claimed that he would not have entered into the consent order if he had known earlier of the letter's existence, and he contended that the censure was inequitable in light of this "new" evidence. Pet. App. 3a-4a.

2. The Commission denied petitioner's request to vacate the sanction. It determined that the appropriate standard to apply to petitioner's request was that used in *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), in which the Court required a party seeking modification of an injunction entered by consent to establish "a clear showing of grievous wrong evoked by new and unforeseen conditions." The Commission found that petitioner had not met that standard. Pet. App. 8a-15a.

3. The court of appeals denied the petition for review filed by petitioner. The court did not decide whether the Commission had, as petitioner contended, erroneously used the standard articulated in *Swift*, rather than a different standard urged by petitioner. Instead, the court held that "[n]o matter which standard is used here," Pet. App. 5a, in light of the unreasonable delay and the substantial prejudice that

---

[1] Petitioner claims that Roche concealed the letter from him and from the Commission. Pet. 6.

the Commission would experience if it had to reopen the case, the Commission did not err in refusing to grant the requested relief. *Id.* at 6a-7a.

The court found that petitioner's delay was unreasonable because he had all of the information he needed to contest the order when he obtained the letter, yet he failed to explain why he did not object to the order soon thereafter. The court rejected petitioner's argument that delay was necessary in order to establish that the order resulted in reputational harm to him, because the harm should have been obvious as soon as the order restricting his supervisory activities for as long as 12 months was entered. Pet. App. 5a-6a.

The court also found that where, as in this case, a consent order was entered with no evidentiary hearing, delay would substantially prejudice the Commission: "If sanctioned parties easily are able to reopen consent decrees years later, the SEC would have little incentive to enter into such agreements. There would always remain open the possibility of litigation on the merits at some time in the distant future when memories have faded and records have been destroyed." Pet. App. 7a.[2]

ARGUMENT

This case involves a request to vacate a sanction imposed by consent in an administrative proceeding brought by the Commission pursuant to Section 15(b)(4)(E) and (b)(6) of the Securities Exchange Act,

---

[2] The court further found that allegations of continuing embarrassment in business relationships would not compel relief, particularly since the consent decree imposed no ongoing restraints on petitioner's activities. Pet. App. 6a.

15 U.S.C. 78*o*(b)(4)(E) and (b)(6). There is no statutory or judicial authority regarding the standard to be used with respect to such a request to vacate. The court of appeals did not reach petitioner's argument regarding the proper standard because it held that, under any standard, petitioner would not be entitled to relief. Accordingly, petitioner's contention that the standard used by the court of appeals conflicts with "dispositive" case law is wholly meritless.

1. Petitioner argues (Pet. 9-13) that the court of appeals erred in refusing to apply the standard of review for requests to modify or vacate injunctions set forth in *SEC* v. *Warren*, 583 F.2d 115 (3d Cir. 1978), a formulation different from that in *Swift*. He contends that the court of appeals' "fail[ure] to recognize dispositive precedent" (Pet. 10) creates a conflict between its decision and the Third Circuit's decision in *Warren*. Pet. 17.

Contrary to petitioner's assertion, there is no such conflict. The Second Circuit decided this case on the basis of petitioner's six-year delay in seeking relief from the censure, holding that this unreasonable delay and the substantial prejudice that reopening the case would cause the Commission justified the Commission's refusal to grant relief. The court stated that this was the correct result "[n]o matter which standard is used," Pet. App. 5a, and it therefore did not address the appropriateness of any particular standard. Thus, petitioner's lengthy discussion of what he regards as the competing standards (Pet. 9-13) is irrelevant.

There is no merit to petitioner's contention that the use of delay as a basis for decision "has no foundation in case law or governing statutes" and

"will inevitably cause confusion to future petitioners." Pet. 13. To the contrary, the rationale for the court's decision comports with well-established principles underlying the equitable doctrine of laches as well as Federal Rule of Civil Procedure 60(b)(2), which requires that a motion for relief from final judgment based on newly discovered evidence be made within a reasonable time not to exceed one year after the judgment was entered. It can hardly "confuse" persons seeking relief based on allegedly "new" evidence to learn that a six-year delay is unreasonable.

2. Petitioner also challenges (Pet. 18-21) the adherence by the Commission to the *Swift* standard. As previously noted, however, this issue is not presented by the decision below, because the court of appeals in this case neither approved nor rejected the Commission's use of the *Swift* standard.

In any event, the Commission's choice of the *Swift* standard was entirely reasonable. Because Congress has not specified the standard to be applied by the Commission in reviewing a request to vacate sanctions imposed in administrative proceedings under the Exchange Act, the Commission's choice of a standard is entitled to deference as long as it is reasonable. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[3]

---

[3] For this reason, there is no merit to petitioner's argument (Pet. 22-23) that the Commission "disregarded binding judicial precedent" in refusing to adopt the *Warren* standard. No other circuit has followed *Warren* in *SEC* cases, and the Third Circuit itself, since *Warren*, has applied the *Swift* standard in cases arising under other statutes. See SEC C.A. Br. 18-19.

In any event, this case is wholly different from *Warren*. In *Warren*, the Third Circuit affirmed a district court order

The Commission reasonably chose the *Swift* standard, finding that it "strikes a fair balance between equitable needs for relief from an order and the need for finality of administrative decisions." Pet. App. 11a.[4]

---

dissolving an injunction previously entered by the district court itself, which had the effect of eliminating any prospective, legally binding restrictions on the defendant's conduct. In this case, by contrast, the order in question was entered by the Commission, not a district court, and therefore involves questions of deference to the responsible administrative agency that were not present in *Warren*. In addition, the 12-month bar in the Commission's order expired of its own force five years ago. Petitioner thus seeks, not to prevent the Commission's order from having any ongoing legal effect (for it has none), but to have the order of censure vacated ab initio. That relief is quite different from what the district court granted in *Warren*. The Commission did not err in concluding that a *Swift*-type standard should be applied where a party seeks to have a prior order set aside in its entirety in circumstances such as these, especially where, as here, the request was based on "new" evidence that was available immediately after the prior order was entered.

[4] In support of his argument (Pet. 20-21) that the Commission's use of *Swift* was improper, petitioner cites several cases that employ a standard other than *Swift*. Those cases, however, are inapposite. *United States* v. *United Shoe Machinery Co.*, 391 U.S. 244 (1968), involved an attempt by the party that obtained an injunction to have it *strengthened*, a procedural setting that presented "the obverse of the situation in *Swift*." *Id.* at 249. *System Federation No. 91, Railway Employees' Dep't* v. *Wright*, 364 U.S. 642 (1961), held that the amendment of a statute in a way that brought the terms of a consent decree into conflict with statutory objectives justified modification of the decree. Finally, *Kozlowski* v. *Coughlin*, 871 F.2d 241 (2d Cir. 1989), and *New York State Ass'n for Retarded Children*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

SIMON M. LORNE
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

RANDALL W. QUINN
Senior Litigation Counsel

DIANE V. WHITE
Senior Counsel
Securities and Exchange Commission

NOVEMBER 1993

Inc. v. *Carey*, 706 F.2d 956 (2d Cir.), cert. denied, 464 U.S. 915 (1983), involved consent decrees entered into in the context of institutional reform litigation, which this Court has distinguished as a unique type of litigation in which application of the *Swift* standard is inappropriate. See *Rufo* v. *Inmates of the Suffolk County Jail*, 112 S. Ct. 748, 757-759 (1992); see also *Board of Educ.* v. *Dowell*, 498 U.S. 237, 247 (1991).